

Fraud Enforcement and Recovery Act Signed into Law

May 20, 2009

Earlier today, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA) (S. 386). Overwhelmingly supported by both chambers of Congress, FERA is intended to strengthen and enhance the arsenal of criminal enforcement mechanisms available to federal prosecutors to combat financial fraud and to provide additional funding to federal agencies and prosecutors to hire additional personnel—all of which is designed to safeguard the nearly \$3 trillion in “bailout” funds that may be spent to stabilize the economy. Neil Barofsky, Special Inspector General of the Troubled Asset Relief Program (SIGTARP), the watchdog agency for TARP funds, has estimated that as much as 10%, or \$300 billion, of these “bailout” funds may be at risk of fraud.

As discussed in our [April 30, 2009 LawFlash](#),¹ FERA institutes several significant changes to the False Claims Act (FCA), 31 U.S.C. § 3729, and to numerous existing federal criminal statutes. The House version of FERA, which the Senate also passed, includes four amendments that substantially impact certain provisions of the FCA. Specifically, the new law does the following:

- Causes a complaint or amendment to a *qui tam* relator’s complaint filed by the government to “relate back” to the date of the original complaint for statute of limitations purposes. This will provide the government with significant latitude to delay its intervention and to add new claims.
- Expands the Attorney General’s Civil Investigative Demand (CID) authority to, *inter alia*, permit any information obtained via the CID to “be shared with any *qui tam* relator if the Attorney General or designee determine it is necessary as part of any [FCA] investigation.” This amendment could potentially allow *qui tam* relators to use information shared by the government to supplement or support their FCA claims.
- Broadens the class of whistleblowers that may file discrimination and retaliation claims to include a “contractor” or “agent,” in addition to an “employee,” and removes the requirement that the retaliatory action be taken by an “employer.”
- Allows counsel for the government or the relator to serve a “complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed” by the government or the relator on state and local law enforcement authorities that investigate and prosecute FCA cases on behalf of the government.

1. This LawFlash can be found online at http://www.morganlewis.com/pubs/LIT_ScourgeOfFraud_LF_30apr09.pdf.

FERA also authorizes a total of \$245 million per year over the next two years for the Department of Justice (DOJ) to hire prosecutors, and for the DOJ, FBI, and other law enforcement agencies to hire investigators, forensic analysts, and support staff to “rebuild [the] nation’s ‘white collar’ fraud enforcement efforts.”

Although FERA is intended to expand the scope of numerous federal criminal statutes and the FCA in order to deter and prosecute mortgage, securities, and other financial fraud related to the enormous economic recovery efforts, it is debatable whether these amendments are necessary to combat fraud with respect to the TARP and other stimulus funds given the arsenal of existing criminal statutes already at prosecutors’ disposal. Even SIGTARP’s Barofsky has indicated that current laws—such as the federal mail and wire fraud statutes that federal prosecutors have used to combat financial fraud cases for decades—are more than sufficient to prosecute financial fraud involving these “bailout” funds.

Ultimately, FERA’s main impact may be felt through (1) an increase in financial fraud investigations, due to the significant resources allocated to hire additional federal prosecutors and agents to investigate and prosecute these cases; and (2) an increase in whistleblower actions under the FCA based on claims of misuse of TARP or other stimulus funds, given the significant substantive amendments FERA makes to the FCA. Nevertheless, recipients of TARP and other financial rescue funds should be on notice of the potential risk of liability posed by FERA.

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